U.S. Supreme Court

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In the

Supreme Court of the United States

OCTOBER TERM, 1956

No. 895

WICHITA FALLS INDEPENDENT SCHOOL DISTRICT, *et al.*,
Petitioners,

v.

ALFRED AVERY, JR., A Minor, by His Mother and Next Friend, (MRS.) ALFRED AVERY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on January 9, 1957.

OPINIONS BELOW

The opinion of the District Court for the Northern District of Texas (R. 94-96) is not reported, but appears in the Transcript of the printed record on appeal at pages

94-96. The opinion (R. 101-115) and dissent (R. 117-143) in the Court of Appeals for the Fifth Circuit is not yet reported, but is reprinted in the Appendix hereto at pages 17 and 27, respectively.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 9, 1957 (R. 106-115), and is reprinted in the Appendix at pages 17-26. The jurisdiction of this Court is invoked under *28 U. S. C. 1254(1)*.

QUESTIONS PRESENTED

1. Whether, after a school board has in good faith taken positive steps to comply with the *Brown* decision of this Court and the Negro plaintiffs sought no tangible relief that had not previously been granted them by the board itself, the District Court may be required nonetheless to retain the case on its docket indefinitely so that any future complaints which these or other Negro school children or their parents may have about the board's conduct of school administration may be heard in this suit?

2. Whether the District Court may be compelled to retain jurisdiction of a controversy that has become moot for the sole purpose of acting as a super school board in overseeing the day-to-day administrative action of the duly elected board in the conduct of the public school system.

STATEMENT

This suit was brought by the families of several colored children early in December of 1955 (R. 15), who had applied for admission to the Barwise School operated by Petitioners, and were refused admittance on or about September 7, 1955 (R. 18, 25 & 36). The complaint sought a declaratory judgment and injunctive relief, temporary and permanent. It asked that Defendants (Petitioners here) be restrained from discriminating against all Negro minors of public school age in depriving them their right to register, enroll and receive instruction in the free public elementary school in their community and *nearest their respective homes*[1] without any distinctions being made as to them on the basis of their race and color, etc. (R. 11).

Petitioners here admitted the applicability of *Brown v. Board of Education of Topeka, 349 U. S. 294*, to their school district (R. 16-17). They had chosen to comply (R. 20); had made a start (R. 21); and had definite plans to effect desegregation of all schools operated by them within a matter of months (R. 21); and they admitted the authority of the court to grant any injunctive relief to which plaintiffs might prove themselves entitled.

Defendants (Petitioners here) denied the right of plaintiffs to declaratory judgment under Rule 57 (R. 16)[2]; defendants also denied that the named plaintiffs might

[1] (Emphasis added.) See R. 11.

[2] Petitioner contended and contends that all Plaintiff's propositions were already determined by the school *segregation cases* which are stare decisis thereto.

properly represent all other Negro minors categorized "as all other colored children"[3] (R. 17-18).

The basic facts which are not in dispute are as follows:

The schools operated by the Wichita Falls Independent School District opened on September 7, A. D. 1955 (R. 5). Complainants, or presumably some of them, were among the families of several colored children who applied for admission to Barwise School that day and were referred to Booker T. Washington School (R. 18, 25 & 36). They were told why they could not be admitted to Barwise until the completion of the Sunnyside Heights School (named Lamar School) (R. 18, 25, 36 & 37).

Of the schools operated by the Wichita Falls Independent School District, only the Sheppard Air Force Base School was opened on a non-segregated basis (R. 5, 21, 43, 54, 55, 61, 62, 65, 67, 72 & 76) and was attended by both colored and white students (R. 43). This was pursuant to the action of the School Board on July 11, 1955, rescinding its former action of January 21, 1955, and electing to operate Sheppard Air Force Base Elementary School on a non-segregated basis for the school year of 1955-56. The Board gave as its reasons for doing so this Court's decree on segregation together with the pronouncement of the State Board of Education of Austin, Texas, as to the eligibility of integrated schools to receive state funds (R. 46, 55, 63 & 64).

[3]Petitioner contended and contends that no legal rights or relations of the actual parties in controversy existed because individual Plaintiffs, as well as all the actual class they might conceivably have represented, had already been admitted in the school to which they sought admission.

Sunnyside Heights Addition is a new addition situated a considerable distance south of the Barwise School, but in the old Barwise School District (R. 20). A new elementary school called Lamar School was under construction in such addition (R. 80). During the summer of 1955, the boundary lines had been re-drawn dividing old Barwise District in anticipation of the opening of Lamar School in September (R. 81). The old Barwise School had been re-named A. E. Holland School at the recommendation of a committee of Negro citizens. This was prior to the notification by the State Board of Education that the payment of State School aid might be applied to integrated schools (R. 63).[4] Due to rains and shortage of materials, the completion of the Sunnyside Heights Addition Elementary School (Lamar School) was delayed and all white students in the old Barwise District (including the new Sunnyside Addition) had to attend Barwise School temporarily (R. 80 & 81). It was very crowded (R. 76).

Lamar School was completed December 29, 1955, and on January 4, 1956, all students then attending the old Barwise School were transferred to Lamar School to attend classes while the Barwise School building was re-conditioned to receive students beginning January 23, 1956 (R. 20 & 27).

Complainants filed this suit in December of 1955 (R. 15) and Defendants answered on January 6, 1956.

[4]The case of *McKinney v. Blankenship, 282 S. W. 2d 691*, declaring unconstitutional certain sections of the state laws and constitutions requiring segregated schools was not entered until October 12, 1955.

On January 23, 1956, all qualified applicants, colored or white, who applied for admission to Barwise School, renamed A. E. Holland School, were admitted (R. 28 & 35) and it was opened on a desegregated basis (R. 28, 50, 74 & 76). No white children registered in the school (R. 65).

On or about March 22, 1956, Petitioners here, as Defendants in such cause, filed a Motion to Dismiss Complaint or for Summary Judgment in the alternate with affidavits attached (R. 22, 28 & 29) to which on or about the 26th day of March, 1956, Complainants responded with a Motion to Strike Defendants' Motion to Dismiss or for Summary Judgment (R. 29-31).

At the time of the hearing in the United States District Court on April 3, 1956, there were known to be white families living in the A. E. Holland District (R. 64 & 75), but there were no white children going to A. E. Holland (Barwise) School (R. 64-65). It was not known whether the white families had any children of school age (R. 50 & 65), but if they did, such children could have attended Holland School (R. 43 & 65). Although there is a liberal transfer policy (R. 64 & 71-72), in January, 1956, no white children had come to the superintendent and asked to be transferred out of the A. E. Holland (Barwise) District (R. 75). They might have transferred automatically to Lamar School (in the Sunnyside District) earlier in January to permit renovation of the Barwise building, and failed thereafter to return to A. E. Holland (R. 27, 43 & 65).[5]

[5]It is noted per Appendix page 59 that in September of 1956 when all schools were opened on a desegregated basis only one white student requested and was granted transfer from A. E. Holland District while six colored students requested and were granted transfers therefrom.

The District Court, on April 3, 1956, overruled Complainants' Motion to Strike Defendants' Motion to Dismiss or for Summary Judgment (R. 32), but, nevertheless, did not perfunctorily grant Defendants' Motion to Dismiss or for Summary Judgment. Rather, the Court allowed Complainants to introduce their evidence in support of their case (R. 33). After hearing the pleadings, the testimony of witnesses, and argument of counsel, the Court requested of counsel for the Complainants (Respondents here), "What relief do you contend your case seeks in behalf of these individual Plaintiffs?" (R. 82). Thence, followed a colloquy between the Court and Counsel (R. 83-93) wherein Counsel for Complainants insisted on a declaration and restatement of the law (R. 83); injunctive relief (R. 83 & 87) in substantial accordance with their prayer (R. 84 & 87); that "this is not a suit for a ruling as to how one Barwise School shall be administered; it is a suit for the determination of how all the schools in this district shall be administered" (R. 85); that it was his opinion that as far as the law is concerned, they (complainants) would be in a much better position if they had been excluded (from A. E. Holland School on January 23, 1956). Throughout this colloquy the Court repeated his efforts to determine what specific relief Complainants sought in behalf of themselves, and apparently, in behalf of other colored students in the A. E. Holland District (old Barwise School) (R. 83, 84, 86, 89, 92 & 93).

The District Court concluded (R. 94) that the School Boards have the primary responsibility for compliance and

that while he felt the Courts "have a responsibility and if it becomes necessary that the Courts intervene with all the sanctions and coercions at law, that will have to take place," but that he thought it would be premature for the Court to interfere at this time (R. 94 & 95). He felt that progress had already been made (R. 96) and that the schools had a declared purpose and policy to carry out desegregation in the schools of the district during the next school term, and that the specific grievance alleged by the Plaintiffs from being denied entrance to Barwise School had now become moot (R. 96). This was followed by Plaintiffs' (Respondents herein) Motion to Amend Judgment and enter specific findings of fact and conclusions of law on April 6, 1956, and the Court's Order of April 19, 1956, denying such motion.

On appeal, the Court of Appeals for the Fifth Circuit, with benefit of the full record of proceedings below (R. 103), made the following observations and conclusions:

That Defendants (Petitioners herein) administering schools enrolling more than 13,000 pupils, had not completely desegregated such schools at the time of the trial in the District Court (R. 109); that Plaintiffs may maintain a class action (R. 110); that the District Court had not abused its discretion in declining to enter a decree declaring the rights of the parties or enjoining against discrimination (R. 112); that the School Board had the primary responsibility and the District Court, the discretion, to withhold action when convinced that the Board had

made a prompt and reasonable start and was proceeding toward good faith compliance (R. 113); that at the time of the judgment in the District Court, the case had not become moot and that it was error to dismiss the action (R. 113); that the voluntary cessation of illegal conduct[6] does not make a case moot unless the Court also finds that there is no reasonable probability of return of illegal conduct, etc.,[7] and that it can not be claimed that appeal has become moot through compliance with the proper decree (R. 114); although it is true that as far as the law is concerned, no question is presented on appeal which has not already been settled by the school segregation cases (R. 114); that the facts may be subject to more than one interpretation, and that Appellants (Respondents herein) have questioned whether the desegregation existing in most schools is in fact voluntary[8] (R. 114); that at the time of trial in the District Court, what the school board had done were steps, but no more than steps toward compliance (R. 114); that this Court in *Brown v. Topeka, 349 U. S. 294*, had directed that during the transition period the District Court should retain jurisdiction (R. 114).

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[6]The Court apparently presumes that Petitioners' conduct up until the time that all its schools became desegregated was *illegal*. Petitioners question this where school boards acknowledged their obligation to desegregate and are acting in good faith with all deliberate speed (emphasis added).

[7]The Circuit Court cited *United States v. W. T. Grant Co., 345 U. S. 633*, and *Brownlow v. Schwartz, 261 U. S. 216*, in support of its stated version of the holdings of such cases. Petitioners note that such version is inverted and not only presumes illegality of the administrative actions of the school board, but bad faith and the probability of the return to such *illegal conduct* (emphasis added).

[8]Petitioners find no reference to the word "voluntary" in the *Brown v. Topeka* case. Presumably, its use was intended to have some bearing on *good faith* or the *cessation of illegal conduct* pending appeal. In either event, it hardly seems a proper measure for the discretionary responsibilities of public administrative bodies.

Thence, the Judgment of the District Court was reversed with directions that "the District Court should retain jurisdiction for the entry of all judgments and orders necessary to ascertain, or else to require, good faith compliance."

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because a divided Court of Appeals in the circuit most immediately concerned with the problems of segregation in public schools has, although upholding the District Court's lawful discretion to determine the need for application of equitable remedies, nevertheless, remanded the cause to such District Court to be retained on the docket indefinitely. It was not remanded in such a manner as to afford Complainants relief beyond that which had already been granted them by administrative action of the School Board. It was remanded in such a manner as to afford a forum for Negro people to seek constant judicial review of daily acts of the school administrators. The District Judge had found the cause moot as to the individual Complainants[9] and premature in its prayer for judicial intervention in school affairs in behalf of other colored students. He now finds this cause

[9]Although the Court used the term *moot*, the complaint was obviously dismissed because the Court was unable to find any practical equitable relief to grant the individual complaints or even the actual class (other colored students eligible to attend Barwise). See colloquy, Page 8, supra (R. 83-93). (Emphasis added.)

on his docket for inquisitorial[10] determinations that can result only in his judicial supervision of the discretions of the administrative agency created by the laws of the State of Texas to conduct public schools.

1. The decision of the Court of Appeals erroneously interprets the holding of this Court in the case of *Brown, et al. v. Board of Education of Topeka, et al., 349 U. S. 294* so as to disrupt the orderly administration of the schools by the School Boards that are lawfully and necessarily charged with the responsibility for their management. By such interpretation, the case at bar has ceased to be concerned with the particular wrongs involved in the specific facts alleged and presented in the District Court,[11] and has been transformed into an open forum to which may be directed all present and future complaints by, presumably, any colored pupil in the Wichita Falls public schools. In this case, the Defendants (Petitioners herein) have taken all lawful steps available to them[12] to effect desegregation of the schools operated by them. The District Court, with no guidance whatsoever from the Court of Appeals, is now obligated to make future determinations and exercise future discretions in its retained jurisdiction (R. 114) over

[10]This term was referred to by Justice Ben F. Cameron in his Dissent in this cause, filed January 25, 1957 (R. 123). The Court's own words would seem to imply that the District Court should order some type hearing and investigation for the purpose of *ascertaining* whether Petitioners have in good faith complied with this Court's mandate in the segregation cases (R. 115). (Emphasis added.)

[11]Rule 54(c) F. R. C. P. enlarges the relief which may be granted beyond the askings of prayer for relief; but it does not permit relief to be granted beyond that justified by the facts pleaded and proved. *Thomas v. The Pick Hotels Corporation, 10 Cir., 1955, 224 F. 2d 664, 666.*

[12]Other than to attempt to require mandatory attendance by colored children into schools in districts in which they reside despite their written requests for transfer. (App. 60.)

matters not covered by the pleadings, proof, affidavits, or exhibits, and which by their very nature must be based on future rights of persons within an alleged and undesignated class seeking relief. Inevitably, this must include matters which properly should be considered by the School Board in exercising its discretions and performing its administrative function in the operation of the public schools.[13]

The net effect of the opinion of the Court of Appeals in these respects is clearly in conflict with the holdings of this Court in the cases of *Railroad Commission v. Pullman Co., 312 U. S. 496*, and more recently, *United States v. Western Pacific Railroad Co., 25 L. W. 4028*, and cases cited therein,[14] as well as with segregation cases decided by the Court of Appeals for the Fourth Circuit.[15] The Court of Appeals for the Fifth Circuit makes no mention of the Federal Court's obligations not to intervene in administrative affairs unless and until bad faith is shown, or available administrative remedies have been exhausted. Rather, bad faith appears to be presumed, in school segregation cases, for purposes of such intervention. This matter was graphically pointed out by Justice Ben F. Cameron in his Dis-

[13]Apparently the District Court must hear complaints of whatever nature, e.g., note court's reference to "voluntary" (R. 114) per footnote 8, supra. It can be reasonably anticipated that Plaintiffs' attorney will attempt to use the pending case as a place in which to lodge complaints which properly should be made to the school board. Note questions and testimony in connection with teachers' salaries (R. 59).

[14]See e.g., *General American Tank Car Corp. v. El Dorado Terminal Co., 308 U. S. 422, 433*, and *Far East Conference v. United States, 342 U. S. 570.*

[15]See e.g., *Carson, et al. v. McDowell County (N. C.), 4 Cir., 1955, 227 F. 2d 789;* and *Hood, et al. v. Sumter County (S. C.), 4 Cir., 1956, 232 F. 2d 636, cert. den. 352 U. S. 870;* and *Carson v. Warlick, 238 F. 2d 724, cert. den. Mar. 25, 1957.*

sent (R. 117 & 143), who also comments that such conflict exists not only in the case at bar but in all other recent Fifth Circuit opinions pertaining to segregation matters.[16]

2. The Court of Appeals, as its authority for requiring that the District Court retain jurisdiction, cited this Court's opinion in *Brown, et al. v. Board of Education of Topeka, et al., 349 U. S. 294* (quoting the last sentence of Headnote 10 of the 99 L. Edition 1083 citation thereof). To assume that this Court intended thereby to require mandatory retained jurisdiction in such a situation as that ordered by the Court of Appeals in the case at bar would appear to presume some type illegality during the transitional period as well as to ignore the good faith of Petitioners in commencing and carrying forward the program of desegregation and in declaring their intention to desegregate all schools in good faith and with deliberate speed (R. 94, 95 & 96).

The Supreme Court, in the *Brown* case, supra, cited *Hecht Co. v. Bowles, 321 U. S. 321*, as a guide for determination of traditional equitable principles. In such case, this Court considered whether the legislature, by the use of the term "other order,"[17] had directed that the District Court

[16]See e.g., *Whitmore, et al. v. Stilwell, et al. (Texarkana), 1955, 227 F. 2d 187; Brown, et al. v. Rippy, et al. (Dallas), 1956, 233 F. 2d 796;* and *Jackson, et al. v. Rawdon, et al. (Mansfield), 1956, 235 F. 2d 93*— all with certiorari denied.

[17]Section 205(a) of the Emergency Price Control Act of 1942 provided that "a permanent or temporary injunction, restraining order, or *other order*" be granted. Even the subsequent cases of *Porter v. Warner Holding Co., 328 U. S. 395* and *United States v. Moore, 340 U. S. 616*, in defining additional equitable remedies contemplated by Congress as "other orders" did not appear to contemplate *retained or continuing jurisdiction* as one of the remedies. (Emphasis added.)

should have issued an order "retaining jurisdiction." But this Court appeared to feel that the utilization of retained jurisdiction would have been a matter for the discretion of the District Court,[18] whether authorized by such statute or not, and was a coercive remedy in itself. Even assuming that this Court in the case of *Brown v. Board of Education of Topeka, et al., 349 U. S. 294* intended to confer the "retained or continuing jurisdiction" remedy as an additional *discretionary* equitable remedy (by citing *Hecht Co. v. Bowles, 321 U. S. 321)* on the one hand, it is unlikely that it intended to direct its use *mandatorially* until complete integration is achieved on the other (emphasis added) except in the specific circumstances therein set out.

3. These are questions of grave and national concern and the jurisdictional and procedural problems raised by this petition are not merely interesting legal questions. They involve the very essence of the manner and means of desegregation of the public schools pursuant to the principles promulgated in *Brown v. Board of Education of Topeka, 349 U. S. 294*. The opinion of the Court of Appeals for the Fifth Circuit has modified or hypothecated accepted and established legal and equitable principles in relation to

[18]It is noted in the case at bar that the District Court was not unmindful of the versatility of the remedies available to him for after referring to the *Brown v. Topeka* cases, the Court stated (R. 94-95), "The Courts, of course, have a responsibility and if it becomes necessary that the Courts intervene with all the *sanctions and coercions of the law*, that *will* have to take place." Note also the indication of future use in the event of specific complaints after a reasonable period. (Emphasis added.)

mootness[19] and class actions[20] in such a manner that they are apparently inapplicable to school segregation actions. The need for maintaining a proper relationship between the federal courts and public school authorities has been disregarded and discretions of the school board have been made servient to equitable coercions. Even the federal district courts are apparently no longer the determiners of the facts in segregation matters whenever equitable interference in school board administration is involved, although the law may be settled (R. 114).

CONCLUSION

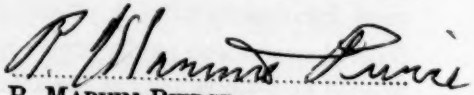
In efforts to effectuate and/or protect newly declared rights of a minority, appellate courts must not, through inadvertence, or for expediency, disregard or materially alter and extend accepted jurisdictional and equitable principles and court procedural practices. In efforts to protect the equality of a minority class, we must not create, in the Fifth Circuit, a special class not bound by conventional principles which require maintenance of a proper and respectful relationship between courts and administrative agencies. These matters are of such far-reaching importance that they deserve serious consideration by this court.

For these reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted, that the opinion of the Court of Appeals for the Fifth Circuit

[19] See Footnote 7, Page 10, supra.

[20] *Martinez v. Maverick County Water Control Imp. Dist., 219 F. 2d 666. Rule 23(a) F. R. C. P.*

should be in these respects reversed and that the opinion of the District Court for the Northern District of Texas should be affirmed.



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APPENDIX

[R-106] In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16,148

ALFRED AVERY, JR., A Minor, by his Mother and Next Friend, (MRS.) ALFRED AVERY, *et al.*,
Appellants,

v.

WICHITA FALLS INDEPENDENT SCHOOL DISTRICT, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Texas

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(January 9, 1957.)

Before RIVES, TUTTLE and CAMERON, Circuit Judges.

RIVES, Circuit Judge: This action was brought by twenty negro children of public school age, residents of the Wichita Falls Independent School District, as a class action, the complaint averring,

> "4. Minor plaintiffs bring this action by their next friends in their own behalf, and on behalf of [R-107] all other Negro minors who are similarly situated because

> of race or color within the defendant Wichita Falls Independent School District. They allege that they are members of a general class of persons who are segregated and discriminated against by order of the defendant board of trustees of the defendant Wichita Falls Independent School District because of their race and color; that the members of the class are so numerous as to make it impracticable to bring all of them before this Court; that they, as members of the class, can and will fairly represent all of the members of the class; that the character of the right sought to be enforced and protected for the class is several and that there is a common question of fact and law affecting the several rights of all and a common relief is sought, and that they bring this action by their next friends as a class action pursuant to Rule 23(a)(3), of the Federal Rules of Civil Procedure."

The prayer was for a declaratory judgment as to the rights and privileges of the class, and that the defendants be enjoined from denying to the minor plaintiffs and the members of the class of persons they represent the right and privilege of attending the public elementary school nearest their respective homes "under the same conditions and circumstances and without any distinctions being made as to them on the basis of their race or color."

The defendants moved to dismiss the complaint and in the alternative for a summary judgment, and the court dismissed the complaint stating in its order of dismissal that:

> "taking into consideration all of the proof, the declared purpose and policy of the defendants to [R-108] carry out desegregation in the schools of the District during the next school term, the progress already made and the definite prospect that such voluntary adjustment will be accomplished within a matter of months, it

> appears to the Court that judicial intervention under the equity powers at this time would be premature or inadvisable, and the Court is also of the opinion that the specific grievance alleged by the plaintiffs, from being denied entrance at the Barwise School, has now become moot."

The negro population in the Wichita Falls Independent School District lived largely in one single concentrated area. At the time the action was filed, some fourteen to sixteen negro children along with 680 white children attended the Sheppard Air Force Base Elementary School which was operated on a non-segregated basis,[1] and nearly all other negro pupils in the Wichita District, slightly over a thousand, attended the Booker T. Washington School, a school operated for negroes only. The answer admitted that,

> "Present statistics indicate that there are approximately 140 colored students who should be admitted to Barwise school if the district comprises a compact unit situated within its natural access boundaries."

In addition there were still other negro children of school age, about seventeen in number, residing within the areas served by various other schools in the Wichita District, but who were "automatically" transferred to the [R-109] Booker T. Washington School. Altogether more than 13,000 pupils were enrolled in the schools of the Wichita Falls Independent School District. No negro child was going to any school other than the Booker T. Washington School and Sheppard Air Force Base School.

[1]It had been desegregated at the request of the United States Department of Health, Education and Welfare.

The plaintiffs lived in the area served by the Barwise School. At the opening of the school term in September, 1955, they applied for admission to that school and it is admitted that they were refused on racial grounds. The Barwise School was then being attended by white children only, but a new school was under construction in Sunnyside Heights, a white section of the town, to which it was planned to transfer the white pupils. The new school had been scheduled for completion by September, 1955, but was not actually completed until January, 1956, after the present suit had been filed. The white pupils were then transferred from Barwise to the new school; Barwise was renamed the A. E. Holland School after a former negro principal of the Booker T. Washington School, and was opened on a nominally desegregated basis though only negro pupils, including the minor plaintiffs, registered.

The Superintendent of Schools testified that a start had been made toward desegregating the schools because the Sheppard Air Force Base School had been desegregated and was attended by white children and by some fourteen to sixteen negro children, and because the A. E. Holland School was legally desegregated though actually attended by negro children only, and, further, that it was the intention of the Board to completely desegregate [R-110] the entire district "at the earliest feasible moment," that "by the beginning in September of this, of 1956, we will have a very good beginning; and by midterm of 1957 it's alto-

gether possible that the entire school system could be desegregated."

Clearly plaintiffs seeking judicial relief from racial discrimination applied against the members of a numerous class may maintain a class action.[2]

At the time the district court dismissed the complaint, a part of the plaintiffs' prayer had been met, that is they were attending the public school nearest their homes, but it is by no means certain that they had the same free privilege of transfer to or attendance on any school of their choice as was accorded the white children. Admittedly desegregation of the schools of the district had not then been completed, though the defendants professed such a purpose, and the court thought that it would be accomplished "within a matter of months."

Upon this appeal, the appellees have attached as an exhibit to their brief an affidavit of the Superintendent of Schools to the effect that the 1956 summer session of the Wichita Falls Senior High School was non-segregated and was actually attended by 411 white and 15 negro children; that, on September 5, 1956, all pupils were ad- [R-111] mitted to the schools to which they applied for admission without any discrimination because of their

[2]Rule 23, F. R. C. P.; The School Segregation Cases, 347 U. S. 483, 495; Beal v. Holcombe, 5th Cir., 193 F. 2d 384; Frasier v. Board of Trustees of University of North Carolina, 134 F. Supp. 589, 593, affirmed per curiam 350 U. S. 979; Holmes v. City of Atlanta, N. D. Ga., 124 F. Supp. 290, 293, affirmed 5th Cir., 223 F. 2d 93, modified and remanded 350 U. S. 879; Kansas City, Mo. v. Williams, 8th Cir., 205 F. 2d 47, 51, 52; Wilson v. Board of Supervisors, E. D. La., 92 F. S. 986, aff'd per curiam, 340 U. S. 909.

color, though no negro children applied for admission to any school except Sheppard Air Force Base School, Booker T. Washington School and A. E. Holland School. The appellees urge upon us that, if not moot at the time the district court dismissed the complaint, the cause has now become moot and that the appeal should be dismissed or that the judgment of the district court should be affirmed.

The appellants, on their part, deny that the public schools within the Wichita Falls Independent School District have actually and in good faith been desegregated, and insist that, it being undisputed that when the complaint was filed the defendants had denied to the plaintiffs solely on account of their race the right to attend the school of their choice, a claimed cessation of such unlawful conduct would not render the action moot nor justify its dismissal.[3]

The Constitution as construed in the School Segregation Cases, *Brown v. Board of Education*, 347 U. S. 483, 349 U. S. 294, and *Bolling v. Sharpe*, 347 U. S. 497, forbids any state action requiring segregation of children in public schools solely on account of race; it does not, however, require actual integration of the races. As was well said in *Briggs v. Elliott*, E. D. So. Carolina, 132 F. Supp. 776, 777:

> "* * * it is important that we point out exactly what the Supreme Court has decided and what it [R-112]

[3]For this position, the appellants cite and rely on the following cases: United States v. Freight Ass'n., 166 U. S. 290; United States v. U. S. Steel Corp., 251 U. S. 417; Trade Comm'n v. Goodyear Co., 304 U. S. 257; Walling v. Helmerich & Payne, 323 U. S. 37; United States v. Oregon Med. Soc., 343 U. S. 326; United States v. W. T. Grant Co., 345 U. S. 629.

has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals."

Keeping that principle in mind, we cannot say that the district court abused its discretion in declining to enter a decree declaring the rights of the parties or enjoining against discrimination. The primary responsibility rested upon the Board, and the district court had the dis- [R-113] cretion to withhold action when convinced that the Board had made "a prompt and reasonable start" and was proceeding to a "good faith compliance at the earliest practicable date."[4] Such start and continuation were steps, but

[4]Brown v. Board of Education, 349 U. S. 294, 300.

no more than steps, toward compliance, and, until that goal was reached, the plaintiffs and the class represented by them would be denied their constitutional right to be free from state imposed discrimination because of their race or color. In the Brown Case, *supra*, it appeared that,

> "The presentations * demonstrated that substantial steps to eliminate racial discrimination in public schools have already been taken, not only in some of the communities in which these cases arose, but in some of the states appearing as *amici curiae*, and in other states as well. Substantial progress has been made in the District of Columbia and in the communities in Kansas and Delaware involved in this litigation." 349 U. S. at p. 299.

The Court nevertheless directed that, "During this period of transition, the courts will retain jurisdiction of these cases." 349 U. S. at p. 301. See also, *Brown v. Rippy*, 5th Cir., 233 F. 2d 796.

We are of the clear opinion that, at the time of the rendition of judgment by the district court, the case had not become moot and that it was error to dismiss the action.

The cases relied on by appellants establish the proposition that voluntary cessation of illegal conduct does [R-114] not make the case moot. If, however, in addition, the court finds that there is no reasonable probability of a return to the illegal conduct, and that no disputed question of law or fact remains to be determined, that no controversy remains to be settled, then it should not ad-

judicate a cause which no longer exists. *United States v. W. T. Grant Co., supra*, 345 U. S. at 633; *Brownlow v. Schwartz*, 261 U. S. 216. It cannot be claimed that the appeal has become moot through compliance with a proper decree. Instead, the claim is that the entire case has become moot through cessation of the unlawful conduct. Ordinarily, such a claim should be considered by the trial court in the first instance. It is said, however, that in so far as the law is concerned no question is now presented which has not already been settled by the School Segregation Cases, *supra*, and that is true. The facts, on the other hand, may be subject to more than one interpretation. The appellants question whether the actual segregation existing in most of the schools is, in fact, voluntary. Events which have occurred since the judgment of dismissal, or which may occur in the future may constitute "good faith compliance," but, in the present circumstances, that question should not be determined by this Court on the basis of ex parte affidavits; such an issue depending largely on the good faith of the defendants can be better decided by the district court after a full and fair hearing. "Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal." *Brown v. Board of Education, supra* at p. 299. The district court should retain jurisdiction for the entry of all judgments and orders [R-115]

necessary to ascertain, or else to require, "good faith compliance."

The judgment is, therefore, reversed and the cause remanded.

REVERSED AND REMANDED.

JUDGE CAMERON DISSENTS.

A True Copy:
Teste:

JOHN A. FEEHAN, JR., Clerk

By /s/ Clara R. James

Clerk of the United States Court of Appeals for the Fifth Circuit.

APPENDIX

[117] In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16,148

ALFRED AVERY, JR., A Minor, by his Mother and Next Friend, (MRS.) ALFRED AVERY, *et al.*,
Appellants,

v.

WICHITA FALLS INDEPENDENT SCHOOL DISTRICT, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Texas

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(January 25, 1957.)

Before RIVES, TUTTLE and CAMERON, Circuit Judges.

CAMERON, Circuit Judge, Dissenting:

I concur in much which is said in the majority opinion and think its reasoning ought to lead to an affirmance of the act of the Court below in dismissing the complaint following its decision on the merits by summary judg-

[R-118] ment. But I cannot go along with the majority's action in remanding the case with instructions that it remain on the docket. The inevitable result of such a course is to thrust back into the field of controversy a problem which can, in my opinion, move towards real solution only in an atmosphere of repose and harmony. I am constrained to set down some of the reasons for my dissent because they are based upon fundamental disagreement with the thinking of my colleagues as to the mission and true competence, in segregation cases, of federal courts generally and of this Court in particular.

Historical principles of equity combine with recent Supreme Court decisions to establish these basic tenets: (a) that school boards and local officials, as administrative agencies, should be given full primary responsibility and authority with the unfettered and unembarrassed opportunity to work out problems in the light of local conditions; (b) that federal district courts should intervene only after the exhaustion of the administrative remedy; and should grant injunctions only in those cases where it is demonstrated that the general good of the public, including the litigants, will be served; and (c) that this Court should set aside judgment based upon the superior knowledge by district judges of local conditions only in rare instances where it is clear that they have misconceived or misapplied the law or have been guilty of plain abuse of discretion. This decision, and others like it recently rendered by this Court do not, in my judgment apply these fundamental and definitely established principles.

[R-119] I.

(a) It cannot, in my judgment, be doubted that the main hope of solving the difficult problems before us rests with local school boards. The Supreme Court recognized this[1] and gave expression to this postulate in the second *Brown* decision: "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for *elucidating, assessing* and *solving* these problems * * *." [Emphasis added.]

It is our duty, under authorities which will be discussed, to assume that school boards are constituted of men of wisdom, judgment and dedication; and to view their actions in a spirit of trust and tolerance, not tinctured with suspicion. Dean Griswold, of the Harvard Law School has said:[2] "The courts do not have the sole responsibility for the proper conduct of our government." And Mr. Justice Stone expressed the same idea:[3] "Courts are not the only agency of government that must be assumed to have capacity to govern." So much of the business of the country is conducted by administrative bodies that courts commit, in my opinion, egregious error when they do not credit their actions as the product of an equal co-ordinate branch of government equally devoted to the public service. The Supreme Court has said of the rela- [R-120] tionship between

[1]The Segregation Cases, as morally referred to by the Supreme Court, are Brown, et al. v. Board of Education of Topeka, et al., May 17, 1954, 347 U. S. 483 (known as first decision); and same case, May 31, 1955, 349 U. S. 294 (known as second decision).

[2]The Fifth Amendment Today, p. 40.

[3]297 U. S., p. 87.

the courts and administrative bodies[4] that "neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim."

(b) The findings of administrative bodies have uniformly been held by the courts in great respect and considered presumptively correct.[5] This Court has heretofore been disposed to adhere strictly to the proposition that school and similar boards should be invested with full and unshackled power to act and that courts should not intervene until exhaustion of their administrative functions.[6]

(c) In dealing with administrative action by State Officers it is helpful to keep in view constantly the much-quoted language of the Supreme Court in *Railroad Commission v. Pullman Co.*, 1941, 312 U. S. 496, 500-501:

> "The history of equity jurisdiction is the history of *regard for public consequence in employing the extraordinary remedy of injunction.* * * *. Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies. * * *.These cases reflect a doctrine of ab- [R-121] stention appropriate to our federal system whereby the federal courts, 'exercising

[4]Hecht Co. v. Bowles, infra, p. 330.

[5]Consider, e.g., Aircraft etc. Corp. v. Hirsch, 1947, 331 U. S. 752, 767; Myers v. Bethlehem Ship Building Corp., 1938, 303 U. S. 41, 50-51, and United States v. Western Pacific R. R. Co., Dec., 1956, ... U. S. ....., 25 L. W. 4028, 4029.

[6]Cook v. Davis, 5 Cir., 1949, 178 F. 2d 595, cert. den. 340 U. S. 811; Bates v. Batte, 1951, 187 F. 2d 142; Peay v. Cox, 5 Cir., 1951, 190 F. 2d 123, cert. den. 342 U. S. 896.

This phase of the question is discussed more fully *infra*, part V (c) and (d).

a wise discretion' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary." [Emphasis added.]

II.

It is important, also, to refresh our minds as to the duty here imposed upon United States District Courts and the character and ingredients of their discretion.

(a) There can be no doubt that the Supreme Court recognized that the responsibility for legal action in these cases should be vested in the judges of the District Courts who had intimate knowledge of local conditions. "* * * because of the great variety of local conditions, the formulation of degrees in these cases presents problems of considerable complexity."[7] In the second *Brown* opinion the Court said: "Because of their *proximity to local conditions* and the possible need for further hearings, the Courts which originally heard these cases can best perform this judicial appraisal * * *." [Emphasis supplied.] And in the series of Segregation Cases pending at the time of the second Brown decision[8] orders were entered sending the cases back to District Courts for consideration in the light of "conditions that now prevail."

(b) In acknowledging the fact of District Court discretion and spelling out the factors which govern that [R-122] discretion, under our constitutional system, the Supreme Court stressed not only the local character of the

[7]First *Brown* opinion, p. 495.

[8]Cf. Board of Supervisors v. Trueaud and allied cases, 347 U. S. 971.

problem, but the inherently public nature of it. In the first *Brown* decision (p. 347), it noted that, at the time the Fourteenth Amendment was adopted, "In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. * * * Education of Negroes was almost non-existent, and practically all of the race were illiterate." It then proceeded to discuss some of the cases in which efforts had been made to eliminate the disparity existing between schools in the South and those in the North. Fundamental differences were frankly recognized while adverting, at the same time, to the fact that the South had not been alone in practicing the discrimination at which the current decisions were aimed. The important sentences[9] in which it pointed out some of the distinguishing characteristics of the discretion admittedly residing in District Courts read thus:

"In fashioning and effectuating the decrees, the Courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a *facility for adjusting and reconciling public and private needs.*" The most important aspect of the principle enunciated in this quotation, and the one which my colleagues seem to leave out of consideration, is the case[10] cited as authority for it and as setting up the standard by which District Courts should be governed in making this adjustment and reconciliation between "public and private needs."

[9]Second *Brown* decision, 349 U. S. 300.
[10]Hecht Co. v. Bowles, 1944, 321 U. S. 321, 329-330.

[R-123] (c) Since *Hecht* is the decision cited by the Supreme Court as illustrating the principles by which District Courts are governed in the exercise of discretion, it ought to be examined in some detail. It began as an injunction proceeding under the Emergency Price Control Act. Government operatives had spot-checked seven out of more than one hundred departments in the large store of the Hecht Company, and had found in excess of 4,500 violations of price regulations.[11] Nevertheless, the District Court[12] thought that Hecht has manifested good faith and was not likely to commit, in the future, anything more than inadverted violations, and it *felt that the public interests would be served better by refusing an injunction than by granting one:* "If in such circumstances an injunction is asked the Court is not deprived of its inherent powers, by calling it a statutory injunction. The Court in such case retains its implied powers, exercised in a sound discretion. * * * As generally understood judicial discretion includes the propriety of granting appropriate relief. All rules in equity must necessarily be sufficiently elastic to do justice in the case under consideration. Courts of equity are not inquisitorial but remedial.

"* * * each case must be determined upon its facts and on equitable principles. In a case such as this an injunction should not issue unless thereby *better compliance with law may be enforced. Such consideration is addressed to the sound discretion of the Court.* * * * It is elementary that

[11] See 137 F 2d 689.

[12] 49 F. Supp. 528, 532.

the purpose of an injunction is to deter rather than to punish. * * * The attitude of the defendant company is not antagonistic but cooperative, and in *my judgment an injunction would not be in the public interest.* * * * I con- [R-124] clude that a just result requires a dismissal of plaintiff's complaint * * *." [Emphasis supplied.] The Court of Appeals for the District of Columbia[13] felt that the District Court had misconceived the purposes of the statute and had given too wide a sweep to traditional equity powers, and it set aside the order of the District Court which had refused the injunction. The Supreme Court granted certiorari[14] and reversed,[15] approving the action of the District Court in basing its denial of injunction on the balancing of public interest versus private needs. Here is its language:

> "We are dealing here with the requirements of equity practice with a background of several hundred years of history. * * *. The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. *The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.* (P. 329.)

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[13]Brown v. Hecht Co., 1943, 137 F. 2d 689.

[14]320 U. S. 727.

[15]Hecht Co. v. Bowles, 1944, 321 U. S. 321.

"* * * We repeat what we stated in United States v. Morgan,[16] supra, respecting judicial review of administrative action:

"'* * * court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the perform- [R-125] ance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed *so as to attain that end through coordinated action.* Neither body should repeat in this day the mistakes made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; *neither can rightly be regarded by the other as an alien intruder*, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim.' The administrator does not carry the sole burden of the war against inflation. The courts also have been entrusted with a share of that responsibility. * * * *For the standards of the public interests, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases.*" [pp. 330-331; emphasis added.][17]

(d) Here, then, is the blueprint suggested by the Supreme Court for the guidance of District Courts in passing upon applications for injunctive relief and in deciding whether the best interest of the public and the private litigant will

[16]307 U. S. 183, 191.

[17]The same idea was expressed in Virginia Ry. Co. v. System Federation etc., 1937, 300 U. S. 515, 552: "More is involved that the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor controversies, * * * is a matter of public concern. * * * Courts of equity may, and frequently do, go much farther both *to give and withhold relief in furtherance of the public interest* than they are accustomed to go when only private interests are involved. [Emphasis added.]

be served by prolongation of litigation. There can be no doubt that the Supreme Court rec- [R-126] ognized the paramount public nature of this problem and the duty of the District Courts to decide questions of policy as well as questions of law.

Ordinarily discretion is lodged in a trial judge because he is present and obtains the "feel" of the trial. This includes the attitudes of the parties and their counsel as revealed in the give and ta' - of the courtroom encounter, the advantage of observing the witnesses as they testify and of appraising from their looks and demeanor the weight and probative value of the words they speak.

But the discretion committed to the trial judge in segregation cases has the added ingredient arising from his proximity to and knowledge of local conditions. His judgment is based upon what he knows from his experience as well as what he hears from the witness stand. The broad and comprehensive terms used in the discussed cases are bound to embrace the manifold intangibles and imponderables which necessarily play such an important part in assessing what is the public good and in balancing public interest against private needs.

III.

(a) This Court has always aligned itself with the universal rule that findings of the trial court must stand unless clearly erroneous, and that exercised discretion should not be disturbed unless plainly illegal or unsupport-

ed by the evidence.[18] This same disposition to lean [R-127] heavily upon the district court was manifested in the first decision of this Court applying the Segregation Cases: "A large measure of discretion, coupled with recognition of judicial knowledge, must be vested in the district judge."[19] But in more recent cases, this Court has apparently been unwilling to accept the findings and approve the discretion of the district courts in such cases.[20]

(b) This apparent change of attitude reflects, in my opinion, a definite departure from the established rules of law recognized as controlling by the Supreme Court in the Segregation Cases as amplified by its decision in the Hecht case. I think it is a mistake for us to attempt to sit in too close chaperonage upon what the district judges do. Unless we are to be given some peculiar powers of divination, we cannot possibly approach the insight which is theirs by reason of their intimate contact with the conditions confronting them.[21]

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[18]E.g. Mutual Life v. Ellison, 1955, 223 F. 2d 686; Indiana Mutual Ins. Co. v. Jones, 1956, 230 F. 2d 500; United States v. Stewart, 1953, 201 F. 2d 135; Bruce v. McClure, 1955, 220 F. 2d 330; and United States v. Smith, 1955, 220 F. 2d 548. And see United States v. W. T. Grant Co., 1953, 345 U. S. 629, 633, where the Supreme Court said a chancellor's "discretion is necessarily broad and a strong showing of abuse must be made to reverse it."

[19]Concurring opinion of Judge Rives in Board of Superintendents v. Trueaud, 5 Cir., 1955, 225 F. 2d 434, 446-447, adopted by the Court en banc in the same case, 1956, 228 F. 2d 895, 896.

[20]E.g. Whitmore, et al. v. Stilwell, et al. (Texarkana), 1955, 227 F. 2d 187; Brown, et al. v. Rippy, et al. (Dallas), 1956, 233 F. 2d 796; and Jackson, et al. v. Rawdon, et al. (Mansfield), 1956, 235 F. 2d 93.

[21]For example, the action of the District Judge in the Mansfield School case was based, in my opinion, on a clear comprehension of the many-sided problem with which he was dealing and he exercised wisdom and discretion in fashioning the decree to accomplish what was best for the public as well as the litigants. Three Negro boys had applied for ad-

(Footnote Continued on Next Page)

[R-128] (c) The Court below in this case, alive to local conditions, acquainted with local needs and with the human beings bearing primary responsibility with respect to them; and observing the demeanor, as witnesses, of the public servants entrusted with the operation of a public school system for the good of all of the people, felt that more would be accomplished if the cudgels of conflict should be dropped, and men of good will should be encouraged to discuss and compose their differences in an atmosphere

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(Footnote Continued from Preceding Page)
mission to the Mansfield High School a month after classes had been begun. The District Judge, acting in obedience to the teachings of the Supreme Court in the *Hecht* case, denied the injunction because he felt that more good could be acomplished by so doing than by granting injunction. Here, in part, are the reasons assigned by him for denying the injunction:

"In finding the equities between the parties I see on the one hand, the situation of this rural school board composed primarily of farmers, agents of the State of Texas * * * opening their meeting with prayer for solution; studying articles in magazines and papers; holding numerous meetings, passing resolutions and appointing a committee to work on a plan for integration—making the start towards obeying the law which their abilities dictate. Further, the trustees now assure the Court that they are continuing their efforts and will work out desegregation. Their committee conferred with these plaintiffs in the presence of plaintiff's parents, and accepted and fulfilled the requests made by plaintiffs with their attorney in August, 1955 for certain administrative steps as a solution for this period of transition, * * *. After the accomplishment of these administrative steps taken at the request of plaintiffs and after school had been in session more than a month, this action was filed.

"After the accomplishment of the above mentioned administrative processes at plaintiffs' request, and after school had begun, it appears to the Court that the issuance of an injunction to effect entrance into Mansfield High School at this time would be unjust to the school trustees and the students alike. * * *.

"It is impossible, however, simply to shut your eyes to the instant need for care and justice in effectuating integration. The directions of the United States Supreme Court allowed time for achieving this end. While this does not mean that a long or unreasonable time shall expire before a plan is developed and put into use, it does not necessitate the *heedless and hasty use of injunction which once issued must be enforced by the officers of this Court regardless of consequences to the students, the school authorities and the public.* This school board has shown that it is making a good faith effort towards integration, and should have a reasonable length of time to solve its problems and end segregation in the Mansfield Independent School District." [Emphasis added.]

permeated as little as might be by animosities. He [R-129] concluded apparently that an ounce of cultivated magnanimity and forebearance might be worth more than a pound of coercion.

IV.

Projected against this background of legal principles, this case seems to me quite simple and easy of solution. I think the Court below handled it well, decided it correctly, and that we should uphold its wise action in all respects.

(a) A group of Negro children desired to enter Barwise School and, at the beginning of the school year, presumably went there to matriculate. They were told that they would be permitted to enter this school as soon as the pupils then attending it could be moved to Sunnyside Heights School, then in course of construction. It was estimated that this shift could take place in about six weeks.[22] Announcement of the completion was made on Christmas Day and all of plaintiffs were admitted to the Barwise School (its name having been changed to Holland) upon convening of the second term in January.

(b) Meantime, about two weeks before the announcement was made, this civil action was begun. It was predicated solely upon the fact alleged in the complaint that Barwise was the school nearest plaintiffs' homes. Alfred Avery, the only plaintiff concerning whom proof was made,

[22]Shortage of steel resulting from the steel strike, together with heavy rains and two floods, brought about a delay in the completion of the new school.

lived about six blocks from the school. Plain- [R-130] tiffs and their attorney knew when the action was begun that all of the relief sought would be given administratively without litigation long before the case could possibly be brought on for hearing.

This action was begun solely because plaintiffs' attorney did not trust the school board, and did not think it was proceeding in good faith. Appellants' brief and oral argument abundantly demonstrate this, and the frequent colloquies between their attorney and the Court bring it into bold relief.[23]

Barwise was a small school with ten classrooms and a capacity of less than three hundred pupils. There were one hundred forty Negroes whose residences would entitle them to claim admittance to Barwise. All of them could not be accommodated and the school board could not practice discrimination in favor of plaintiffs and against the residue, or against the pupils already enrolled therein.

(c) The Trial Judge considered the affidavits and had the benefit of the testimony of one of plaintiffs' parents and of members of the school board. He found that it was not unreasonable to defer the applications of plaintiffs for a few weeks until the physical plants of the school could be altered to meet the new demands; and felt, too, that the school board had wrestled with its vexing problems in a

[23]At one point the Court said to plaintiffs' attorney: "You have misgivings, I am sure, from what has been said * * *[but] personally I have strong faith in the good intentions and good faith of the school board. * * *."

spirit of fairness and good faith and that an injunction or the continued pendency of the suit [R-131] would serve no good purpose, but would do harm. The following quotation from the Judge's opinion sets forth what was behind his judgment:

> "The Supreme Court * * * has recognized very clearly the practical reality that the primary responsibility in this progress of desegregation rests on the local school boards, those nearest to its problems in its local aspects, and that's where it should be properly, so long as local officials demonstrate the attitude to solve the transition * * * with reasonable dispatch. It is of supreme importance that the work should proceed peaceably in this undertaking * * *.
>
> "But the impression I have from what has been presented during the hearing today is that the Board and officials of this School District seem to be men of good will and have set their policy toward the integration of this new educational policy and with that attitude in mind I think it would be premature for courts to interfere. Impatience and precipitancy of spirit are not, I am convinced, nearly so reliable a course as that of depending upon these authorities, once you have substantial evidence that they are acting in good faith and with a real and honest purpose to go ahead and without dragging the plans by any unnecessary or vexatious breaks along the way.
>
> "I have the faith in this School Board that they will measure up to the responsibilities and the plans that have been declared in their behalf here today through their Superintendent and Secretary of the Board and the recorded minutes and by the words of their counsel. * * * I believe it would be a disservice to step in at this time and [R-132] undertake to compel and direct the business of these men under the power of the Court."

The judge who spoke these words had seen the witnesses as they testified, had acquired the "feel" of the case as it unfolded before him; and he demonstrated in his grasp of the problem a wisdom, a patience and a tolerance which invest his words with commanding convictive force. More than that, he was born and had spent his days in close proximity to the locale of this controversy and had an intimate acquaintance with the conditions with which he was dealing. We, who assume to pass upon the wisdom of his discretion, have lived our lives hundreds of miles away from that locale. The trial judge, following the holdings of *Brown* and *Hecht*, felt that more would be accomplished by denying the injunction and removing the case as a constant irritant than by granting the injunction or retaining the case. When we substitute our judgment for his, a lack of perspective is demonstrated along with a definite dissonance with the teachings of the Supreme Court.

V.

It remains, therefore, but to examine the majority opinion to test the reasons upon which the reversal is predicated.

(a) While conceding that the Court below did not err in refusing declaratory and injunctive relief, the opinion intimates that the school board was guilty of some illegal action.[24] In fact, what is said concerning mootness [R-133] is predicted necessarily on the assumption of illegal action and on doubt concerning the good faith of the school

[24]Such phrases occur in the opinion as "voluntary cessation of illegal conduct," and "no reasonable probability of a return to the illegal conduct."

authorities. The opinion does not point to any facts which would furnish the basis for a charge of illegal conduct. Every plaintiff who applied for admission to the Barwise School had gained that admission by administrative action before the trial and there never had been any doubt about the purpose of the school board to comply with the requested admission as soon as physical properties could be changed to meet the new conditions. The timing and other details of the transfers were matters committed to administrative action and the Court was without jurisdiction to intervene in any event unless and until bad faith was shown. *United States v. Western Pac. R. Co., supra.*

(b) The opinion takes note of the suspicions voiced by plaintiffs' counsel that the school board did not intend to do in the future what they solemnly swore they were going to do. The opinion states, "but it is by no means certain that they [i.e. the Negroes] had the same free privilege of transfer to or attendance on any school of their choice as were accorded the white children." Such a reference tends to give substance to the suspicions voiced by plaintiffs which, in my opinion, were without the slightest foundation in the evidence. The fact is that the school board had gone "the second mile" both in action and in purpose in the discharge of its duties and the Trial Judge so thought.

(c) This disposition of the majority to characterize the actions of the school board as illegal because the board [R-134] did not practice precipitate action to grant the plaintiffs the piecemeal relief they sought the minute it

was demanded, based upon its concept that it must look to the public interest as well as plaintiffs' and must deal with the problem in its larger aspect; and to sanction court intervention before the administrative function had been given opportunity to express itself, calls for further discussion of this feature of the problem.

(d) There seems little doubt that the scheme approved by the Supreme Court contemplates that school boards shall have exclusive jurisdiction in making the adjustments brought about by the Segregation Decisions, i.e. in "elucidating, assessing and solving these problems"; and that courts have jurisdiction to intervene only after the administrative process has been exhausted (We leave out of view for the moment the question of bad faith, which certainly is not present here). The Supreme Court has, at the current term, reiterated the rule:[25] "The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. *'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course.*" (Emphasis added.)

This Court has declared unequivocally that this principle applies to school boards dealing with charges of discrimi-

[25]United States v. The Western Pacific R. R. Co., et al., *supra.*

nation based upon assertion of Fourteenth Amend- [R-135] ment rights, *Bates, v. Batte, supra,* 1951, 187 F. 2d 142, et seq:

> "The defendants moved to dismiss * * * because plaintiffs had not first exhausted their administrative remedies provided by Mississippi administrative statutes governing education and controversies arising in and about schools. This motion was denied * * *. After the case had been tried, but before it was decided below this Court, in *Cook v. Davis,* 5 Cir., 178 F. 2d 595, a Negro school teacher salary case * * * held, in a thoroughly considered and carefully reasoned opinion, that until plaintiffs had exhausted their administrative remedies provided by Georgia laws governing education and controversies arising under school laws, they could not maintain their suit.
>
> "The District Judge, of the opinion * * * that the present suit could not be maintained until the available remedies provided by state law had not [sic] been first exhausted, said so in an opinion * * * [and] a judgment dismissing the complaint without prejudice was entered * * *. (p. 143.)
>
> "* * * it is sufficient for us to say that we regard the case of Cook v. Davis as thoroughly considered and well decided and that the statutes of the two states are sufficiently alike to make the decision in Cook's case dispositive of the appeal. The judgment of dismissal for failure to exhaust administrative remedies was right, it is affirmed."

The Cook case had held (p. 600): "The broad principle that administrative remedies ought to be exhausted be- [R-136] fore applying to a court for extraordinary relief, and especially where the federal power impinges on state activities under our federal system, applies to this case

'No one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' *Myers v. Bethlehem Ship Building Corp.*, 303 U. S. 41 at pp. 50, 58 * * * citing many cases relating to relief by injunction. We held in *Bradley Lumber Co. v. National Labor Relations Board*, 5 Cir., 84 F. 2d 97, that the same principle applies to relief by declaratory decree."[28]

(e) In my opinion, what the majority orders to be done here, as well as what this Court ordered in the cases listed in fn. 20, *supra*, offends directly against these recognized principles. By putting this Court in conflict with the Supreme Court in the respect discussed—in which attitude, in my opinion, we have exhibited less sympathetic understanding of the complex problems facing school boards in the South than that shown by the Supreme Court—we invite the District Judges, under oath "to support and defend the Constitution," to base their decisions on their own conscientious convictions of what is constitutional and right under the facts of the cases coming before them.

VI.

(a) The action of the majority in sending this civil action back with instructions to keep it open on the [R-137] docket is, in my opinion, without warrant in law or in fact. The idea seems to be that it may serve as a rallying point

[28]Other Courts of Appeal are currently applying this principle to segregation cases coming before them. See, e.g., Carson, et al. v. McDowell County (N. C.), 4 Cir., 1955, 227 F. 2d 789; and Hood, et al. v. Sumter County (S. C.), 4 Cir., 1956, 232 F. 2d 636, cert. den. 352 U. S. 870.

for plaintiffs or others if their distrust of the school board should prove well founded—that other situations in other schools may be dealt with in this suit. The obvious answer to this attitude is that relief which may be granted in this suit can never rise above the facts pleaded as the basis for that relief.[27]

The sole factual predicate for action here was the assertion that plaintiffs were entitled to attend Barwise School because it was nearest their homes. That right was vouchsafed them long before the case was tried, and there is nothing to be litigated under the facts alleged. No life can be breathed into the case by seeking to tack onto it claims for different relief based upon different facts which may arise in the future.

Much was said in the argument about the right to transfer from one school to the other. Of course, the right to transfer is single, belonging to each individual. A court would not have jurisdiction to intervene until such individual had exhausted administrative remedies. This rule is made clear in the decision of the Court of Appeals for the Fourth Circuit in *Carson v. Warlick*, Nov., 1956, 25 Law Week 2252. "There is no question as to the right of these school children to be admitted to the schools of [R-138] North Carolina without discrimination on the grounds of

[27]Cf. Indemnity Ins. Co. v. Moses, 5 Cir., 1929, 36 F. 2d 219; 6 Moore, Par. 54.62, p. 1208, and 2 Moore, Par. 3.13, p. 1653 and 1954 Cumulative Supplement, p. 107; and cf. Beach v. Kock, 8 Cir., 1944, 140 F. 2d 852, 861-862.

Rule 54(c) enlarges the *relief* which may be granted beyond the askings of prayer for relief; but it does not permit relief to be granted beyond that justified by the facts pleaded and proved. Thomas v. The Pick Hotels Corporation, 10 Cir., 1955, 224 F. 2d 664, 666.

race. They are admitted, however, as individuals, not as a class or group; and it is as individuals that their rights under the Constitution are asserted * * *. It is the state school authorities who must pass in the first instance on their rights to be admitted * * *."

(b) The majority opinion seems to infer that, because plaintiffs alleged that they were bringing a class action, other undisclosed persons might utilize the present suit to bring up new facts and ask new relief. That would not be possible even if this were in any proper sense a class action, which, in my opinion, it is not.

In the first place, plaintiffs never purported to represent anybody but persons having a claim to attend Barwise School based solely upon their contiguity thereto. It is true that they made the general assertion that they spoke for others of their class. But the defendants in their pleadings denied that there was any such class, or that plaintiffs qualified as spokesmen for any class. This created an issue of fact with respect to which plaintiffs bore the burden and no proof at all was offered. The mere *ipse dixit* of the author of the complaint can, of course, avail plaintiffs nothing.[28]

(c) The majority opinion seems further to treat the action as a "true" class action, and to invest it with an outreach broad enough to encompass all of the rights of [R-139] all of the pupils in all of the schools in the Wichita

[28]Lion Bonding Co. v. Karatz, 1923, 262 U. S. 77; Hansberry v. Lee, 1940, 311 U. S. 32; McLellan v. Rose, 5 Cir., 1918, 247 Fed. 721, 724; 3 Moore's Federal Practice, pp. 3418 et seq., 3422 and 3423; and 39 Am. Jur., Parties, §53, pp. 926, et seq.

Falls Independent School District.[29] But plaintiffs have never in their complaint aspired to the maintenance of a "true" class action, categorically limiting by specific averments, the class action they sought to bring to that provided [R-140] in Rule 23(a)(3) F. R. C. P., commonly referred to as the "spurious class suit." 3 Moore, pp. 3442 et seq., and 3456.

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[29]The only possible source of such an idea is the statement of plaintiffs' counsel to the Trial Court: "This is a broader suit than just these twenty-four plaintiffs. This is a class action . . . for a determination of how all the schools in this district shall be administered . . ." But there is no syllable of proof tending to establish that counsel had any authority to speak for such a class or even for any plaintiff except the one who testified. And the Court would not be tempted, if otherwise justified, to indulge any presumptions in favor of the authority of plaintiffs' counsel in view of his recent experience in a District Court in Texas.

He had filed a motion on behalf of two minors by their parents to intervene for the purpose of citing the defendants for contempt of court in Civil Action No. 366, D. C. E. D. Texas, Texarkana Div., Wilma Dean Whitmore, et al v. H. W. Stilwell, President of the Texarkana Junior College, et al, (see fn. 20, *supra*) and his authority to represent the two complaining intervenors had been challenged.

When called to the witness stand in that case he admitted that he had never been employed by the complaining minors or their parents, had never seen them until the day of the trial, and that his authority to represent them had come exclusively through intermediaries essaying to speak for them. A portion of the colloquy following his testimony and that of the two minors at the hearing of September 27, 1956 follows:

"Mr. Tate: May it please the Court, I would like to move the Court to dismiss this suit with respect to this petitioner and ask that they both be dismissed without prejudice so if they want to hire another lawyer, they may.

The Court: You mean you are disqualifying yourself?

Mr. Tate: Yes, sir.

The Court: Your motion will be granted. * * * Now, just a minute, there has been some testimony here that this Court cannot overlook. And in making this statement that I am going to make, I want to say that as far as this Court is concerned, this type of lawsuit stands on the same basis as any other lawsuit filed in this Court and there are certain rules and demeanor that the attorneys of this bar must follow. I would suggest to you, Mr. Tate, that in the future if you expect to appear in this Court in connection with any of these cases or any lawsuit, regardless of what it is, that you be sure that you are properly employed in the case. * * *.

Mr. Tate: I want the Court to know I appreciate very much the situation. * * *."

The distinction is quite important as, in a true class suit, all members of the class are bound by the judgment.[30] On the other hand, the spurious class action is merely a permissive joinder device, and the judgment binds only "those parties actually before the Court." *Martinez, et al. v. Maverick County Water Control etc. District*, 5 Cir., 1955, 219 F. 2d 666.

(d) The majority, in my opinion, misconceives the character of this proceeding. The judgment rendered by the Court below was a summary judgment on the merits and completely disposed of all of the issues raised by the pleadings and the testimony. After filing their answer defining all of the issues raised in the case, defendants had moved the Court "to dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted, or in the alternative to grant summary judgment for defendant under Rule 56, * * *." The motion was supported by affidavits.

Plaintiffs moved to strike that motion because it was in the alternative (which motion the Court below denied), but requested "the right to take testimony on these issues and particularly to examine the defendants Joe B. McNeil and Leroy Stone with respect to the allegations made in their affidavits." The matter proceeded to hearing upon full oral testimony and all parties considered it as a hearing on the merits as is clearly reflected in the arguments [R-141] and in the colloquies between the Court and coun-

[30]Hansberry v. Lee, *supra*; Weeks v. Bareco, 7 Cir., 1941, 125 F. 2d 84, 93, and cf. Troup v. McCart, et al, 5 Cir., 1956, ... F. 2d .....

sel. The Court entered detailed findings of fact on every issue presented, and there is no room for the contention that there was any dispute in the testimony, or any material issue as to the facts. The order entered by it, regardless of the label put upon it, was an order for summary judgment[31] which is a final disposition of the case on the merits and there is nothing left to remand.

VII.

In my opinion, even if we were vested with a discretion, we ought to follow the course so clearly sanctioned in the Supreme Court decisions, by approving the conciliatory action of the Court below in what appears to me to be a wise, tolerant and educated judgment. The net result of the course the majority now commends is to leave the whole delicate problem in the realm of controversy, to invest the participants with the trappings of combat, and to invite prolongation of the struggle. It arms one party with a weapon carefully leveled at the other, inviting one to put the weapon into operation, compelling the other to engage itself in protective measures.

This course represents, in my opinion, a strategic mistake of real magnitude. Practically every responsible [R-

[31]Rule 12(b), F. R. C. P. provides:

"If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, * * *."

And see Slagle v. United States, 5 Cir., 1956, 228 F. 2d 673, and authorities therein cited; and 2 Moore's Federal Practice, p. 2256, and 1954 Cumulative Supplement, p. 148.

142] person in a place of public leadership has stated that this problem will be solved only as men's hearts are reached and touched. Weapons have never changed the human spirit, or fomented good will, and the threat of force they carry has never nurtured brotherhood. To tempt one litigant to keep his eyes glued to the gunsight, thus provoking the other inevitably to divert most of its energies from constructive and probably generous action to preparations for defense, is to perform a distinct disservice to both and, more important, to the public.

The Supreme Court has recognized as imposed upon the District Courts responsibilities of statesmanship in addition to the duty to pass upon legal points. Judicial fiats are not self-executing. It would be well if we should pause to ponder upon these words written by Mr. Justice Jackson in the last days of his life:[32]

> "It is not idle speculation to inquire which comes first, either in time or importance, an independent and enlightened judiciary or a free and tolerant society. Must we first maintain a system of free political government to assure a free judiciary, or can we rely on an aggressive, activist judiciary to guarantee free government? While each undoubtedly is a support for the other, and the two are frequently found together, it is my belief that the *attitude of a society and of its organized political forces, rather than its legal machinery*, is the controlling force in the character of free institutions. * * *.
>
> "Judicial functions, as we have evolved them, can be discharged only in that kind of society [R-143]

[32]The Supreme Court in the American System of Government, by Robert H. Jackson, pp. 81 and 82-3.

which is *willing to submit its conflicts to adjudication and to subordinate power to reason.* * * *." [Emphasis supplied.]

Those words fit well into the admonition of the Supreme Court in Hecht that co-ordinated action between administrative body and Court is an absolute essential to the successful functioning of either; and that it is of supreme importance that neither shall look upon the other,—and that the public shall look upon neither,—as an "alien intruder." By leaving the problem before us in litigation, we contribute towards reducing it to a level which assumes that it posseses only a horizontal dimension. The truth is that the vertical dimension is of transcendent importance.

A True Copy:
Teste:

(Seal)

/s/ Edward W. Wadsworth

Clerk of the United States Court of Appeals for the Fifth Circuit.